Tokheim Corporation *and* Laborer's International Union of North America, AFL–CIO, Local Union No. 846. Case 10–CA–13947

December 16, 1982

DECISION AND ORDER

BY CHAIRMAN VAN DE WATER AND MEMBERS FANNING AND JENKINS

On August 13, 1979, Administrative Law Judge Ralph Winkler issued the attached Decision in this proceeding. Thereafter, the General Counsel filed exceptions and a supporting brief, and the Respondent filed cross-exceptions and a supporting brief.

Pursuant to the provisions of Section 3(b) of the National Labor Relations Act, as amended, the National Labor Relations Board has delegated its authority in this proceeding to a three-member panel.

The Board has considered the record and the attached Decision in light of the exceptions and briefs and has decided to affirm the rulings, findings, and conclusions of the Administrative Law Judge, only to the extent consistent herewith.

The Administrative Law Judge found, *inter alia*, that the Respondent did not violate Section 8(a)(1) of the Act by denying employee Patricia Sharp's request for a "witness" as opposed to a "representative" at a meeting called to inform Sharp of her discharge, and by interrogating employee Carl Holcomb with regard to his union activities. The General Counsel has excepted to the Administrative Law Judge's dismissal of these complaint allegations. We find no merit in the exception concerning Sharp, and do find merit in the exception concerning Holcomb, but we do so only for the reasons discussed below.

The facts with regard to Sharp are not in dispute. On August 24, 1978, the Respondent's general manager, Lon Neal, notified Superintendent Clarence Brown that Sharp should be terminated. The reason for the termination was linked primarily to an incident of the previous day when Sharp struck a fellow employee. In addition, during Sharp's employment of approximately 1 month, she experienced numerous safety derelictions and personal injury problems on the job.

However, before Brown was able to notify Sharp of her discharge, Sharp approached Neal and thanked him for "giving her a job."[1] When Neal expressed sorrow that the job had not worked out, Sharp indicated that she had not quit yet. Neal realized that Brown had not yet informed Sharp of her discharge so he told Sharp to see her foreman, Winston Broom, immediately.

Shortly thereafter, Sharp met with Brown, Broom, and two other management representatives. At the outset of the meeting, Brown requested a "witness," which request was denied. Instead, the meeting was taped. Brown informed Sharp of her discharge within the first 2–3 minutes of the taped portion of the meeting, after which Brown and Sharp, at Sharp's behest, engaged in a lengthy discussion of Sharp's work performance and the incident of the previous day when she struck a fellow employee. At the conclusion of the meeting, Brown informed Sharp that "we have already made up our minds," and Sharp's discharge was effectuated.

The foregoing facts present the issue of whether Respondent violated Sharp's rights as defined in *N.L.R.B.* v. *J. Weingarten, Inc.*, 420 U.S. 251 (1975), when it denied her request for a "witness" at her discharge interview. In finding no violation of the Act in the denial, the Administrative Law Judge passed on a number of issues. First, he correctly found that the fact that the employees were not represented by a union at the time of the discharge interview would not, of itself, detract from Sharp's right to representation.[2]

Next, the Administrative Law Judge found that pursuant to the Board's decision in *Certified Grocers of California, Ltd.*, 227 NLRB 1211 (1977), Sharp had the right to request representation at the interview with Brown, apparently because Respondent engaged in certain dialogue with Sharp at the meeting. However, the Administrative Law Judge further found that inasmuch as Sharp merely requested a "witness," rather than a "representative," at her meeting with Brown, the Respondent did not violate Section 8(a)(1) by denying that request.

In *Baton Rouge Water Works Company*,[3] a majority of the Board reversed *Certified Grocers* and held that under the Supreme Court's decision in *Weingarten*, an employee has no Section 7 right to the presence of his union representative at a meeting with his employer held solely for the purpose of informing the employee of, and acting upon, a previously made disciplinary decision. The Board majority reasoned that:

> [A]s long as the employer has reached a final, binding decision to impose certain discipline on the employee prior to the interview, based on facts and evidence obtained prior to the interview, no Section 7 right to union represen-

[1] Neal had arranged for Sharp's employment by the Respondent.

[2] *Materials Research Corporation*, 262 NLRB 1010 (1982). In so concluding, however, the Administrative Law Judge made certain gratuitous comments concerning Board decisional law on this issue. We hereby disavow his comments.

[3] 246 NLRB 995 (1979).

> tation [here, employee representation] exists under *Weingarten* when the employer meets with the employee simply to inform him of, or impose, that previously determined discipline.[4]

The Board also emphasized that "the fact that the employer and the employee thereafter engaged in a conversation at the employee's behest or instigation concerning the reasons for the previously determined discipline will not, alone, convert the meeting to an interview at which the *Weingarten* protections apply."[5]

In the instant case, the record is clear that the Respondent had reached a final decision to discharge Sharp prior to the August 24 meeting at which Sharp was informed of her discharge. The record is also clear that the Respondent had reached that decision based upon the facts and evidence which it had obtained prior to the meeting of August 24, and it is undisputed that the sole purpose of the meeting was to inform Sharp of her discharge. Moreover, the discussion which ensued after Sharp was informed of her discharge was clearly insufficient to convert the meeting into an interview requiring the *Weingarten* protections. Therefore, regardless of whether Sharp merely requested a "witness" as distinguished from a "representative," we find that the Respondent did not violate Section 8(a)(1) of the Act by denying Sharp any representation at the discharge meeting of August 24.[6] In light of our dismissal of this complaint allegation, we find it unnecessary to pass on the issue of remedy, and the Administrative Law Judge's discussion of that issue at footnote 4 of his Decision.

The facts with regard to Holcomb reveal that on August 21, 1978, Supervisor Gene McCallie approached Holcomb at his job station and asked whether Holcomb went to the union meeting of the previous night. Holcomb replied that he did. On September 14, 1978, McCallie again approached Holcomb at his job station at or about 2:30 p.m. to request that Holcomb work overtime. When Holcomb refused, McCallie asked, "[w]hat are you gonna do? Got another meeting?" Holcomb responded, "[d]amn straight." The Administrative Law Judge found no violation for the above interrogations, relying on Holcomb's testimony that he wore a union button in the plant and made no effort to conceal his prounion sentiments; that he distributed union buttons in the parking lot without comment from management representatives; that he had several discussions with McCallie regarding unions; that the union meeting of September 14 was common knowledge in the plant; and that he did not feel threatened when McCallie asked him if he was going to the meeting.

In our view, the factors relied upon by the Administrative Law Judge in dismissing the complaint allegation are insufficient to negate the coercive nature of McCallie's interrogations of Holcomb. The Board has held in the past that notwithstanding an employee's open declaration concerning his union preferences, an employer is not free to probe directly or indirectly into the reasons why the employee supports the union.[7] The Board has also repeatedly held that "an employee's subjective state of mind is not probative evidence of employer restraint and coercion which is violative of Section 8(a)(1)," but rather the test is whether the employer has engaged in conduct which "tends to interfere with the free exercise of employee rights under the Act."[8] Since we would find that McCallie's questioning of Holcomb on August 21 and September 14 tended to interfere with Holcomb's exercise of his rights under the Act, we conclude that the Respondent thereby violated Section 8(a)(1) of the Act.[9]

ORDER

Pursuant to Section 10(c) of the National Labor Relations Act, as amended, the National Labor Relations Board hereby orders that the Respondent, Tokheim Corporation, Jasper, Tennessee, its officers, agents, successors, and assigns, shall:

1. Cease and desist from:

(a) Interrogating employees concerning their union activities under circumstances which tend to coerce and restrain them in the exercise of the rights guaranteed them under Section 7 of the Act.

(b) In any like or related manner interfering with, restraining, or coercing employees in the exercise of rights guaranteed them under Section 7 of the Act.

2. Take the following affirmative action:

(a) Post at its Jasper, Tennessee, plant copies of the attached notice marked "Appendix."[10] Copies of said notice, on forms provided by the Regional Director for Region 10, after being duly signed by

[4] *Id.* at 997.

[5] *Id.*

[6] *Baton Rouge Water Works Co., supra.* For the reasons set forth in his dissenting opinion in the cited case, Member Fanning would find that Respondent violated Sec. 8(a)(1) by denying Sharp's request for a representative.

[7] *ITT Automotive Electrical Products Division,* 231 NLRB 878 (1977).

[8] *Paceco, a Division of Fruehauf Corporation,* 237 NLRB 399, 400 at fn. 4 (1978).

[9] We find it unnecessary to pass on whether Respondent's actions with respect to Layne also violated Sec. 8(a)(1) since the remedy we would provide in finding a violation would be cumulative.

[10] In the event that this Order is enforced by a Judgment of a United States Court of Appeals, the words in the notice reading "Posted by Order of the National Labor Relations Board" shall read "Posted Pursuant to a Judgment of the United States Court of Appeals Enforcing an Order of the National Labor Relations Board."

the Respondent's authorized representative, shall be posted by it immediately upon receipt thereof, and be maintained by it for 60 consecutive days thereafter, in conspicuous places, including all places where notices to employees are customarily posted. Reasonable steps shall be taken by the Respondent to insure that said notices are not altered, defaced, or covered by any other material.

(b) Notify the Regional Director for Region 10, in writing, within 20 days from the date of this Order, what steps the Respondent has taken to comply herewith.

CHAIRMAN VAN DE WATER, concurring and dissenting:

I concur in the holding that the Respondent's August 24, 1978, interview of Patricia Sharp did not violate Section 8(a)(1). I do so, however, for the reasons set forth in my dissenting opinion in *Materials Research Corporation*, 262 NLRB 1010 (1982), wherein I set forth my view that *Weingarten* rights do not attach in a facility where no recognized or certified union is present. Because Sharp and her fellow employees were not so represented at the time of the interview, I would hold that the Respondent was free to conduct the interview after having denied Sharp's request that she be accompanied by a fellow employee "witness" or "representative."

Regarding the questions posed by Supervisor McCallie to employee Holcomb, I would find, essentially for the reasons stated by the Administrative Law Judge, that the questions did not violate Section 8(a)(1). In this regard, I agree with the Administrative Law Judge's statement that "non-coercive casual questions respecting union matters are not per se violations of the Act." Accordingly, I respectfully dissent.

APPENDIX

NOTICE TO EMPLOYEES
POSTED BY ORDER OF THE
NATIONAL LABOR RELATIONS BOARD
An Agency of the United States Government

WE WILL NOT interrogate our employees concerning their union activities under circumstances which tend to coerce them in the exercise of the rights guaranteed them under Section 7 of the Act.

WE WILL NOT in any like or related manner interfere with, restrain, or coerce our employees in the exercise of the rights guaranteed them under Section 7 of the Act.

TOKHEIM CORPORATION

DECISION

STATEMENT OF THE CASE

RALPH WINKLER, Administrative Law Judge: Hearing in this matter was held in Chattanooga, Tennessee, on June 6, 1979, upon a complaint issued by the General Counsel and an answer filed by Respondent.

Upon the entire record in this case, including my observation of the demeanor of the witnesses and upon consideration of briefs, I make the following:

FINDINGS OF FACT

I. BUSINESS OF RESPONDENT

Respondent Tokheim Corporation is an Indiana corporation with a plant at Jasper, Tennessee, where it manufactures fuel pumps and hose reels. The parties agree, and I find, that Respondent is engaged in commerce within Section 2(6) and (7) of the Act.

II. THE LABOR ORGANIZATION

The Union, Laborers International Union of North America, AFL-CIO, Local Union No. 846, is a labor organization within Section 2(5) of the Act.

III. THE UNFAIR LABOR PRACTICES

The principal questions in this case are whether Respondent violated *Weingarten*[1] rights of Patricia Sharp on the occasion of the latter's exit interview at Respondent's Jasper plant on August 24, 1978, and, if so, what the appropriate remedy should be. Respondent has approximately 110 employees at this plant. Respondent's general manager is Lon Neal; Superintendent Clarence Brown was plant manager at the time, Carolyn Skiles was personnel manager, Stan Case was general foreman, and Winston Broom was Sharp's foreman.

Respondent hired Sharp as a probationary plant employee in July 1978 at the direction of General Manager Neal. Neal is not personally involved in the hiring of plant personnel, but he did direct Sharp's employment at the request of Sharp's father; Neal had a close relationship with her parents and owed them a "nominal obligation." (Sharp is the only plant employee Neal has hired.) Sharp experienced recurring safety derelictions and personal injury problems on the job, and about a week before her termination Neal commented to Brown that he (Neal) did not think Sharp was "going to make it" and that Brown should consider terminating her.

Sharp struck a fellow employee at work on August 23. The next morning Neal, upon receiving a complete report on the incident, notified Brown that Sharp be terminated. Before reporting to her scheduled shift that day (August 24), Sharp approached Neal about 3 p.m. and thanked him for "giving her a job." (This was the first time after more than a month's probation that Sharp thanked Neal for the job.) Neal told Sharp he was "sorry it didn't work out" to which Sharp responded, "Well, I haven't quit yet." Neal repeated he was "sorry it didn't

[1] *N.L.R.B.* v. *J. Weingarten, Inc.*, 420 U.S. 251 (1975).

work out," and he told Sharp that her foreman, Winston Broom, "would explain it to [her]." Sharp first testified that she did not understand Neal's comment to her at the time; later confronted with her pretrial affidavit, she reluctantly admitted that she had realized something was "wrong." Sharp immediately sought out Broom, but Broom said nothing to her.

While speaking with Sharp on the mentioned "thanks" occasion, Neal apparently realized that Sharp had not yet been advised of her termination. Neal thereupon sent word to Brown that Brown should "handle the discharge." Sharp meanwhile had a conversation about her situation with coworker Carl Holcomb; Holcomb offered to be her "witness" in a meeting with Respondent and Sharp said she wanted him as a "witness." Brown, Skiles, Broom, and Case then went to the employee break area where Sharp was, and Brown requested that she meet with them in the break room.

At the outset of the meeting attended by Brown, Skiles, Broom, Case, and Sharp, Sharp told Brown that she wanted "someone else" there as a witness, and Brown said that "we are your witnesses" and that she did not need anyone else. Brown then offered to tape the meeting and, according to Sharp, Sharp said that was not necessary and that she preferred to have a "witness."[2] Brown told Skiles to obtain a tape recorder, which Skiles did, and the meeting or interview was recorded. The meeting lasted about 15 or 20 minutes and mainly consisted of conversation between Sharp and Brown about Sharp's work performance and the incident of the previous day when she assaulted another employee. Sharp thus was fired, and the record establishes that Neal's earlier instructions in the matter left Brown no discretion but to terminate her.

An election was conducted by the Regional Office on October 20, 1978, following which the Union was certified as a statutory representative. The parties agree that this subsequent certification of the Union plays no part in the resolution of the Sharp matter.

A. *Conclusions as to Sharp*

The record establishes that Respondent did not plainly notify Sharp of her discharge until Brown did so at the termination meeting with her; that Sharp had reason to fear her meeting with Brown might result in disciplinary action; and that Brown denied Sharp's request for a "witness" to the meeting. The record further shows without controversion that Neal had already decided to discharge Sharp for cause and had directed Brown to implement that decision; that Brown had no discretion to withhold or alter Neal's instruction; that Respondent did fire Sharp for cause; that the Brown-Sharp termination meeting was not an investigatory interview; and that Sharp did not request a statutory representative at her meeting with Brown.

Nonunion setting. The Board's decisional law since *Weingarten* has gone beyond the Court's actual holding in that case. There the Court held only that Section 7 "guarantees an employee's right to the presence of a union representative at an investigatory interview in which the risk of discipline reasonably inheres"; the Court was unquestionably referring to participation by a statutory representative for only such majority representative may lawfully safeguard "the interests of the entire bargaining unit" (420 U.S. at 260). In *Glomac Plastics, Inc.*, 234 NLRB 1309 (1978), the employer denied an employee's request to have a union committee member present at an investigatory meeting in a situation where the employer was unlawfully refusing to recognize the union as a majority bargaining representative. Stating that *Weingarten* was "grounded on Section 7 of the Act which guarantees . . . the right of employees to 'engage in . . . concerted activities for . . . other mutual aid or protection,'" the Board found a *Weingarten* violation in *Glomac* upon holding that "Section 7 rights . . . are in no wise dependent on union representation for their implementation" (*Id.* at 1310) See, also, *Brown & Connolly, Inc.*, 237 NLRB 271, 286 (1978).

The Board followed its *Glomac* rationale in *Anchortank, Inc.*, 239 NLRB 430 (1978), where subsequent to an election won by a union but before the union's certification the employer refused to allow union representatives to accompany two employees at an investigatory interview. Stating that the Court in *Weingarten* was principally concerned "with the right of employees to have some measure of protection when faced with a confrontation with the employer which might result in adverse action against the employee," the Board once again concluded that "the status of the union as a bargaining representative has no bearing on the employee's right to have a representative present during an investigatory or disciplinary interview." "In these circumstances," the Board said, "the status of the requested representative whether it be that of Union not yet certified or simply that of fellow employee does not operate to deprive the employees of the rights . . . in Section 7." (*Id.* at 431.)

At no material times in the present case was there a recognized union, and a union was neither unlawfully refused recognition nor had it won an election. However, the sweep of *Glomac* and *Anchortank* is inescapable. I thus find in accordance with those cases that, whatever *Weingarten* rights Sharp may have had, those rights were unaffected by the nonunion setting in the present case. In so finding I am mindful of Respondent's comment respecting "mind-boggling" problems in this connection (Resp. br. p. 9). As an original proposition, I might agree with Respondent. However, the Board has decided otherwise, and its determinations are binding here.

Nature of the interview—exit vs. investigatory. As indicated above, the Brown-Sharp termination meeting was not investigatory in any sense. Brown had been instructed to discharge Sharp and he had no discretion to do otherwise, and the sole purpose of the meeting was to terminate Sharp and explain the reasons for the termination. It was perhaps an unusual meeting in that Brown and three other management representatives were present at the termination of a probationary employee, but this was undoubtedly because of the unusual circumstances of her original hire by General Manager Neal. But the Board has spoken on this issue, as well. As ap-

[2] Although Sharp denied having any one in mind as a witness, she clearly did intend Holcomb for the role.

plied to interviews, Board decisions appear to use the words "investigatory" and "disciplinary" interchangeably (see, for example, *Anchortank, Inc., supra*),[3] so that I believe the Board's law to be that, other material elements being present, a *Weingarten* situation arises whenever disciplinary action takes place on an occasion at which the employer questions the affected employee, "engage[s] in any manner of dialogue, or participate[s] in any other interchange which could be characterized as an interview." *Amoco Oil Company*, 238 NLRB 551 (1978); *K-Mart Corporation*, 242 NLRB 855 (1979). And this situation thus also exists at an exit interview stage regardless, as in the present case, that the disciplinary measures be previously determined and have no possibility of change. *Certified Grocers of California, Ltd.*, 227 NLRB 1211 (1977).

Sharp's request—witness vs. representative. I have found above, upon consideration of all relevant testimony, that Sharp in effect requested a "witness" at her meeting with Brown. She did not request an individual who would speak as an advocate for her or one who would otherwise assist in clarifying facts and issues. She merely requested, in effect, that Holcomb, unnamed by her at the time, be present solely in an observational role; i.e., a "witness." While some may consider this an overly nice exercise in semantics, I believe the meaning of this role is material to a resolution of this case in view of the Court's *Weingarten* decision. A significant factor in the Court's rationale was the important function of a union representative at an "investigatory interview," 420 U.S. at 262–263. Although, as indicated, the Board has applied *Weingarten* in nonunion settings and to noninvestigatory interviews, I am unaware that it has further extended the Supreme Court's decision to a request for observers.

In the circumstances, therefore, I find that Respondent did not deny a request for a representative (as distinguished from a "witness") and I accordingly conclude that Respondent has not violated any *Weingarten* rights alleged in the complaint.[4]

B. *Interrogation*

The complaint also alleges several instances of unlawful interrogation by Shift Supervisor Gene McCallie on or about August 21 and September 14, 1978. This alleged conduct, the parties agree, has no bearing on the *Weingarten* matter. It has been mentioned that the Union was certified following a Board-conducted election on October 20, 1978, and the record further shows that Respondent and the Union executed a collective-bargaining agreement effective February 5, 1979. The record does not contain any showing of union hostility by Respondent.

According to Carl Holcomb, McCallie asked him on August 21 whether he had attended a union meeting the previous night. Holcomb replied he had, and nothing else was said. Holcomb also testified that McCallie asked him to work overtime on September 14, and that, when Holcomb said he could not do so, McCallie simply asked whether he (Holcomb) would be going to a union meeting that night and that Holcomb answered affirmatively.

Holcomb further testified that he wore a union button in the plant, that he made no effort to conceal his prounion sentiments, that he distributed union buttons in the parking lot without comment from any management representative, that he had had several discussions with McCallie concerning unions, that the fact of the scheduled union meeting on September 14 was common knowledge in the plant, and that he did not feel threatened when McCallie asked if he were going to the meeting.

Alma Layne testified that she wore a union button in the plant and made no effort to hide her union sympathies and that no one had ever threatened her in that regard. The General Counsel called her to testify that her foreman, McCallie, came to her at work on September 14, 1978 (the day of the scheduled union meeting which Holcomb testified to have been of common knowledge in the plant), and told her that she was not missing the meeting, that the other employees were waiting for her outside the gate. Layne merely commented that it "didn't matter to me, that I could go to more meetings."

Nothing more need be said about McCallie except that it has long been established that noncoercive casual questions respecting union matters are not *per se* violations of the Act. *Blue Flash Express, Inc.*, 109 NLRB 591, 593–594 (1954); *Whittaker Knitting Mills, Inc.*, 207 NLRB 1019, 1022, fn. 8 (1973); cf. *Philo Lumber Company*, 229 NLRB 210, fn. 2 (1977). Cf. *Hanover Concrete Co.*, 241 NLRB 936 (1979).

CONCLUSIONS OF LAW

1. Respondent is an employer within Section 2(6) and (7) of the Act.

2. The Union is a labor organization within Section 2(5) of the Act.

3. Respondent has not violated the Act in any respects alleged in the complaint.

[Recommended Order for dismissal omitted from publication.]

---

[3] The Supreme Court in *Weingarten* used only the phrase "investigatory interview." 420 U.S. at 252, 253, 258, 259, 262, 263, 264, 267.

[4] Another issue raised by Respondent concerns a reinstatement and backpay remedy recommended by the General Counsel should a *Weingarten* violation be found. The General Counsel seeks such relief even though the denial of Sharp's request had no influence at all on her discharge for cause. The General Counsel's recommendation apparently comports with Board cases. *Certified Grocers of California, Ltd., supra* at 1215; *Anchortank, Inc., supra* at 431, fn. 9. Contra: *N.L.R.B.* v. *Potter Electric Signal Company*, 600 F.2d 120, 124 (8th Cir. 1979). I shall not address this remedy issue, however, as I am dismissing the *Weingarten* allegation.